



November 15, 2012

**VIA ELECTRONIC MAIL:** [secretary@cftc.gov](mailto:secretary@cftc.gov)  
c/o Mr. David A. Stawick, Secretary

Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21 Street, N.W.  
Washington, DC 20581

Chairman Gary Gensler  
Commissioner Jill E. Sommers  
Commissioner Bart Chilton  
Commissioner Scott D. O'Malia  
Commissioner Mark P. Wetjen

With a copy to:

Division of Swap Dealer and Intermediary Oversight  
Gary Barnett, Director

Re: Request for Relief to Address "Legacy" Structured Finance Transactions

Dear Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen:

The Securities Industry and Financial Markets Association ("SIFMA")<sup>1</sup> and the American Securitization Forum ("ASF")<sup>2</sup> hereby submit, for purposes of discussion, a draft exemptive order

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<sup>1</sup> SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit [www.sifma.org](http://www.sifma.org).

<sup>2</sup> The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to [www.americansecuritization.com](http://www.americansecuritization.com).

from the Commodity Futures Trading Commission ("Commission" or "CFTC") providing relief to "legacy" structured finance transactions.

Before briefly introducing our submission, we first wish to express our appreciation for the efforts of the Commissioners, their counsels and the Division of Swap Dealer and Intermediary Oversight (the "Division") that resulted in the interpretive and no-action letters issued by the Division prior to October 12. These letters provided much needed regulatory certainty for many structured financings that they would not be considered to be commodity pools and an extension of time for others during which the Commission's staff has had an opportunity to continue to work with the industry on related issues.

As you are aware, our members continue to struggle with these issues in connection with "legacy entities," by which we mean structured finance entities that are not issuing additional securities and have the other characteristics discussed in the discussion draft attached to this letter. We believe there are factors that distinguish these financings from those done on a prospective basis that lessen the Commission's regulatory interests and justify their being granted regulatory relief on a broader basis. In particular, we note that there would be significant problems faced by these entities, their sponsors or other related persons and their investors if they were required, effectively on a retroactive basis, to comply with commodity pool regulation. Moreover, because swaps were not "commodity interests" at the time these structures were established, investors were not relying on the commodity pool regulatory system. The draft attached as Exhibit A accordingly seeks an exemptive order that would provide relief from commodity pool regulation for these legacy entities. We submit this draft to facilitate further discussions with Commissioners and staff about the most appropriate statutory vehicle for providing relief and the scope of relief.<sup>3</sup>

In addition, due to the number and variety of structures in this market and the volume and complexity of their documentation, our members are finding that conducting the necessary legal analysis in light of the emerging regulatory framework, including the matters left open under the interpretive letter referred to above, is a difficult and time-consuming process. Our members are very concerned that there is not sufficient time remaining before year-end to identify and analyze transactions as to which a question of possible commodity pool characterization may remain and, if applicable, determine the availability of exemptions or whether registration as a commodity pool operator may be required. Moreover, until they identify the scope of these issues, our members cannot further embark on evaluating what they would need to do to achieve compliance, given that the rules relating to commodity pool operators generally do not contemplate the special attributes of structured finance transactions. We are therefore asking the Division to consider a further extension of time for registration by persons that may need to register solely due to swap-related activities in connection with structured finance transactions. Such an extension would permit further time for analysis by participants in the structured finance market, and would allow them to seek tailored relief from the Commission or its staff based on particular facts and circumstances, where that may be desired by such persons.

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<sup>3</sup> We note that our draft request contemplates a range of transaction types that share common characteristics but is not intended to include all legacy Structured Finance Transactions not addressed by the October 12th relief. We understand that other requests may be made of the CFTC regarding relief for particular types of transactions not addressed by this letter.

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We greatly appreciate your consideration of these requests, and the further analysis and detail set forth in the attached discussion draft, and look forward to the opportunity to discuss these matters further with the Commission and its staff. Please contact Chris Killian at (212) 313-1126 or [ckillian@sifma.org](mailto:ckillian@sifma.org), Tom Deutsch at (212) 412-7107 or [tdeutsch@americansecuritization.com](mailto:tdeutsch@americansecuritization.com), or Evan Siegert, ASF Managing Director, Senior Counsel, at (212) 412-7109 or [esiegert@americansecuritization.com](mailto:esiegert@americansecuritization.com).

Sincerely,

A handwritten signature in blue ink, appearing to read "Richard A. Dorfman".

Richard A. Dorfman  
Managing Director  
Head of Securitization  
Securities Industry and  
Financial Markets Association

A handwritten signature in black ink, appearing to read "Tom Deutsch".

Tom Deutsch  
Executive Director  
American Securitization Forum

A handwritten signature in blue ink, appearing to read "Chris Killian".

Christopher B. Killian  
Managing Director  
Securities Industry and  
Financial Markets Association

**Discussion Draft for Exemptive Order for Legacy Structured Finance Entities, 11/15/12**

The Securities Industry and Financial Markets Association (“SIFMA”) and the American Securitization Forum (“ASF”) hereby petition the Commodity Futures Trading Commission (“Commission” or “CFTC”) for an exemption pursuant to Section 4(c) of the Commodity Exchange Act (as amended, the “CEA”) with respect to the legacy structured finance entities described below.

SIFMA and ASF believe that it would be appropriate for the Commission to provide broad “grandfathering” relief for structured finance entities that have not issued and will not issue any additional securities after October 11, 2012. Granting this petition will prevent unintended and adverse consequences to investors and other market participants associated with legacy transactions, consistent with the public interest.

Each of our organizations previously has set forth to the Commission and its staff our concerns regarding securitization and other structured finance transactions (collectively, “Structured Finance Transactions”) in the light of amendments to commodity pool regulation under the CEA by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”).<sup>4</sup> These concerns and our related requests for interpretive guidance and other appropriate relief also were discussed in meetings with the Commissioners and members of their staffs, and with CFTC staff. In response to those requests, the Division of Swap Dealer and Intermediary Oversight (the “Division”) issued interpretive letter No. 12-14 on October 11, 2012 (the “Securitization Interpretation”), which, among other things, provides an interpretation concerning the definition of commodity pool with respect to securitizations meeting certain criteria.

While the Division's interpretation encompasses a significant portion of the securitization market, the Division recognized in its letter that it had not addressed all types of Structured Finance Transactions, and indicated that it would be open to discussions with securitization sponsors to consider particular structures under a facts and circumstances analysis. However, a very substantial volume of outstanding Structured Finance Transactions closed and issued securities prior to October 12, 2012, when the term “swap” became effective in the definitions of “commodity pool” and “commodity pool operator.” In many cases, the sponsor or other persons associated with a transaction have questions about their regulatory status. The very large numbers, by transaction and by dollar volume, of legacy Structured Finance Transactions where questions are arising would make a sponsor-by-sponsor, deal-by-deal facts and circumstances analysis unworkable within almost any time frame and impossible by December 31 of this year.<sup>5</sup>

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<sup>4</sup> We refer to the ASF letters of [August 17, 2012](#) and [October 5, 2012](#), and to the SIFMA letter of [August 21, 2012](#).

<sup>5</sup> In this regard, we note that the Division indicated its view that the industry requests for relief had been too broad with respect to certain transaction classes, including collateralized loan obligations and collateralized debt obligations. For these categories alone, by way of example, the data presented in the SIFMA letter of August 21, 2012 indicated that as of June 2012, there were estimated global outstandings of 839 transactions totaling \$359.93 billion in the case of CLOs, and 1,889 transactions totaling \$504.57 billion in the case of CDOs.

As addressed in the letters previously submitted by SIFMA and by ASF, and in our subsequent discussions with the Commission and staff, we emphasized the particular and unique problems faced by legacy Structured Finance Transactions that would have closed and issued securities prior to the effective date of the change in law, and the structured finance entities involved (“legacy entities”). We are mindful of the concern expressed by the Division about the breadth of the industry's requests leading up to October 12, but we believe that legacy Structured Finance Transactions are distinguishable. Putting aside for purposes of this petition whether, for transactions closed after October 11, 2012, any of the structures involved should be properly considered to be commodity pools, SIFMA and ASF believe that there are important practical, equitable and regulatory policy considerations — including the predictability of financial markets and respect for contracts — that should be taken into account when considering the treatment of legacy Structured Finance Transactions and legacy entities.

### **Summary of Issues for Legacy Entities**

The commodity pool regulatory scheme plainly is designed for structures that are very different from Structured Finance Transactions, such that it is problematic to determine how particular regulatory requirements would be applied or interpreted in the structured finance context or how such transactions and their related persons would comply. These issues are important for structured finance in general, but are most critical for legacy Structured Finance Transactions, which cannot feasibly be modified in order to comply. As discussed below, we believe that compliance with many of the disclosure and similar requirements would be meaningless, both to the Commission and to investors, even if it could be achieved. In addition, because swaps were not “commodity interests” at the time these structures were established, investors were not relying on the commodity pool regulatory system.

Although many types of Structured Finance Transactions use swaps such as interest rate or currency swaps for hedging purposes, other structures also use swaps to obtain exposure to assets such as securities or loans; these synthetic exposures may form a substantial portion, or the entirety, of the entity's investment portfolio. Some of these entities have a managed portfolio and the ability to acquire or dispose of assets. Historically, however, structured finance entities generally have not entered into or acquired commodity interests other than swaps, such that, for the vast majority of this market, only the addition of swaps as a category of commodity interests under the Dodd-Frank Act has even raised a question as to whether any of such structures could be considered to be commodity pools.

Even synthetic and managed Structured Finance Transactions, however, generally lack key defining characteristics of commodity pools —

#### ***Primarily Issuers of Fixed-Income Securities***

Structured finance entities typically issue primarily fixed-income securities, often in multiple tranches with different payment priorities.<sup>6</sup> These are debt or debt-like

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<sup>6</sup> In this letter, references to fixed-income securities mean securities defined as follows in Rule 3a-7(b)(2), 17 CFR § 270.3a-7(b)(2) under the Investment Company Act:

“Any securities that entitle the holder to receive:

(i) A stated principal amount; or

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instruments with a stated interest rate or yield and principal balance and a specified maturity date which do not share in profit or loss from the financial assets and any swaps the structured finance entity may hold.

This is not just a matter of form; there is a fundamental difference between the function of equity in a Structured Finance Transaction and the issuance of equity interests by investment funds. In Structured Finance Transactions, whether the traditional securitizations that are financing vehicles for financial institutions and others, or vehicles such as some CDOs that are structured primarily to create investment product, the majority, typically the preponderance, of the securities issued to third parties (i.e., persons other than the transaction sponsor and its affiliates) consist of fixed-income securities. Structured Finance Transactions are designed to protect the repayment of the fixed-income securities, generally highly-rated securities, and use overcollateralization and payment priorities, and sometimes additional credit enhancements (such as reserve accounts, financial guaranties or letters of credit) to do so. The “equity interests” whether in the form of an interest retained by a sponsor or issued and sold to third parties are part of the overcollateralization. Thus, the distinction we are drawing in describing Structured Finance Transactions is not whether any equity is or is not issued to third parties, but the purpose of equity in the structure. An equity investor in a Structured Finance Transaction, if not the sponsor, generally is an institutional or other sophisticated investor that understands it is buying the “first loss” position in the structure, not a proportionate interest in an investment pool. This distinction in the purpose of equity is one of the key reasons why so much of the CFTC's reporting and other compliance requirements are inapplicable by their terms to Structured Finance Transactions.

### ***Generally No “NAV”***

Most types of structured finance entities do not calculate a “net asset value” for their issued securities. In many cases, the relevant pools of assets do not have a readily ascertainable market value. Even when the assets are relatively liquid and have a market value that can be determined, there are structural reasons for which the market value of those assets is considered to be irrelevant in most types of Structured Finance Transactions. As discussed above, these structural reasons include an emphasis on protecting the repayment of fixed-income securities with the principal

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- (ii) Interest on a principal amount (which may be a notional principal amount) calculated by reference to a fixed rate or to a standard or formula which does not reference any change in the market value or fair value of eligible assets; or
- (iii) Interest on a principal amount (which may be a notional principal amount) calculated by reference to auctions among holders and prospective holders, or through remarketing of the security; or
- (iv) An amount equal to specified fixed or variable portions of the interest received on the assets held by the issuer; or
- (v) Any combination of amounts described in paragraphs (b)(2) (i), (ii), (iii), and (iv) of this section;

Provided, That substantially all of the payments to which the holders of such securities are entitled consist of the foregoing amounts.”

function of equity being to provide overcollateralization (i.e., loss absorption) for the fixed-income securities.

## **Potential Adverse Consequences for Legacy Entities and Related Persons**

### ***Infeasibility of Compliance with Retroactive Regulation***

Structured finance entities are established with limited purposes relating to the assets they are to acquire and the securities they will issue to fund that acquisition, and are subject to numerous restrictive covenants limiting their ability to engage in other activities or to take actions not contemplated at the time of formation.

Structured Finance Transactions cannot readily be restructured or amended. It can be difficult or impossible to obtain the investor and other consents typically required to amend structured finance documents. Thus, Structured Finance Transactions generally have little to no ability to modify their transaction documents, assets, hedging or other swap transactions, or operating procedures.

Most structured finance entities have no ability to raise additional capital after they close. At the time of formation these vehicles estimate anticipated expenses and provide for coverage of those expenses. Depending upon the governing documents and structure of a given legacy transaction, there either may be no source of funds available for additional expenses involved in complying with newly applicable regulations, or such expenses may reduce the funds needed to repay debt outstanding to investors. Because of these characteristics, the classification of legacy transactions as commodity pools would be not only retroactive but potentially punitive in nature.

Retroactive classification as a commodity pool would raise a number of other practical problems for many Structured Finance Transactions. Indeed, for many such transactions, it may not be feasible even to identify which person associated with the structure is a commodity pool operator; activities that now could be viewed as those of a commodity pool operator in respect of an entity that enters into swap transactions, such as soliciting investors and directing the entity's entry into swaps, may have been completed years ago.

For investors such as investment vehicles that hold structured finance securities, issues could arise as to whether their own status or compliance obligations under commodity pool regulation are affected if certain of their investments could be viewed as indirect investments in commodity interests<sup>7</sup> due to the issuers of such structured finance securities having been retroactively recharacterized as commodity pools. Such an effect presumably is unintended, but could have far-reaching ripple effects if not addressed.

Financial institutions and other participants in the structured finance markets, confronted with a looming December 31 registration guideline for legacy Structured Finance Transactions the classification of which (and/or of their own relationship to the transaction) they may view as uncertain will be forced to choose between (i) not registering as a commodity pool operator, and

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<sup>7</sup> See, Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252, 11268 (Feb. 24, 2012).

being viewed as potentially out of compliance with law, or (ii) registering, and being unable to comply with a reporting and compliance framework that does not apply to their structures.<sup>8</sup>

SIFMA and ASF do not believe that these and other potential adverse consequences to investors, transaction sponsors and other market participants due to a retroactive application of new law and regulations could have been intended as goals of the Dodd-Frank Act. The Dodd-Frank Act has a number of specific provisions addressing the regulation of Structured Finance Transactions, but neither these provisions nor the legislative history indicate an intent that these vehicles be regulated as commodity pools. We do not believe the CFTC even contemplated this scope of regulation in its rulemakings earlier this year relating to commodity pool operators. There is no mention of Structured Finance Transactions in those releases, including in the cost/benefit analysis discussion when in fact there could be materially increased costs of doing business (or investment losses) incurred by sponsors, service providers, investors and other participants in the structured finance markets.

### ***Regulatory Requirements Burdensome and Largely Irrelevant to Structured Finance***

For the above reasons, SIFMA and ASF believe that the retroactive imposition of the commodity pool regulatory framework on legacy Structured Finance Transactions has the potential to cause investor losses and adverse financial and other consequences for transaction sponsors and other market participants without producing any benefit to the marketplace or to investors in legacy transactions. Indeed, given the mismatch between the CFTC's reporting and other compliance requirements on the one hand, and the nature of Structured Finance Transactions on the other hand, we do not believe it would produce any benefit to investors in new Structured Finance Transactions. But the redundancies (relative to the securities laws that otherwise apply) or complete irrelevance of the requirements are most glaring in the context of entities whose securities issuances are all in the past.

### **Exemptive relief for Legacy Entities**

A proposed exemptive order setting forth the criteria for “legacy entity” status and the scope of the relief sought is attached to this petition as Schedule I.

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<sup>8</sup> We note that the CFTC's Rule 4.13(a)(3), a *de minimis* exemption that in principle could apply to a number of Structured Finance Transactions, is formulated in terms that present substantial interpretive difficulties in the context of structured finance. The exemption also is expressly inapplicable to registered securities offerings (many, but not all of which, would be covered by the Securitization Interpretation). Finally, a commodity pool whose operator is exempt from registration is still a commodity pool and that status could raise, retroactively, compliance issues and other potential risks for the entity and its related persons or investors.



PROPOSED EXEMPTIVE ORDER

[Summary of the analysis in the Petition.]

The Commission, pursuant to section 4(c) of the CEA, based upon the analysis and assumptions set forth above, which are incorporated herein, and in order to avoid the frustration of economic expectations of investors in outstanding structured finance securities, and the sponsors and/or other persons associated with the formation or operation of such transactions, and to eliminate regulatory uncertainty for any of the foregoing persons, hereby issues this final Order.

A Legacy Entity, as defined below, shall not be considered to be a “commodity pool,” as defined in section 1a(10) of the CEA, or a “pool” as defined in regulation 4.10(d) of the Commission's rules, and any person that has acted or acts as a sponsor or as a servicer, trustee, administrator, or other service provider to, or otherwise on behalf of, any such entity, shall not be considered to be a “commodity pool operator,” as defined in section 1a(11) of the CEA and regulation 1.3(cc) of the Commission's rules.

“Legacy Entity” means an entity, regardless of its legal form, formed prior to October 12, 2012, that has entered and may in the future enter into swap transactions, whether or not for hedging purposes, and satisfies the following criteria:

- (i) it is a limited purpose entity that issued securities to finance the acquisition and holding of financial assets, in cash or synthetic form;
- (ii) it has not issued and will not issue additional securities after October 11, 2012 (securities issued to effect the transfer or exchange of previously issued securities, or the replacement of lost or mutilated securities, are not considered to be additional securities for this purpose);
- (iii) it has not acquired or entered into and will not acquire or enter into commodity interests other than swaps;
- (iv) at closing, or at the time of its most recent issuance, its securities issued to third parties (that is, excluding interests retained by or issued to its sponsor and/or affiliates of its sponsor), consisted primarily of fixed-income securities, as defined in Rule 3a-7(b)(2) under the Investment Company Act.

Except to the extent of the treatment of Legacy Entities provided for above, this Order is made without determination or prejudice as to whether any particular category of structured finance transaction is or is not a commodity pool; provided, however, that nothing in this Order is intended to limit interpretive letter No. 12-14 of the Division of Swap Dealer and Intermediary Oversight.

*[Note: add reference to additional interpretive or no-action letters relating to structured finance that may be issued after the date of this petition and prior to the date of the Order.]*